

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2010 MSPB 131

Docket No. AT-831M-09-0875-I-1

**Frank B. Carroll,
Appellant,
v.
Office of Personnel Management,
Agency.**

July 8, 2010

Frank B. Carroll, Miami, Florida, pro se.

Karla W. Yeakle, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of an initial decision, and the erratum to that decision, that affirmed the Office of Personnel Management's (OPM's) reconsideration decision, finding that the appellant received an overpayment of retirement benefits under the Civil Service Retirement System and was not entitled to a waiver of recovery of the overpayment, and adjusting the repayment schedule on the grounds of financial hardship. For the reasons set forth below, we GRANT the appellant's petition for review. In addition, we REOPEN the appeal on our own motion under [5 C.F.R. § 1201.118](#), AFFIRM the

initial decision with respect to its findings that OPM proved the existence and amount of the overpayment and that the appellant is without fault in the creation of the overpayment, VACATE the initial decision with respect to its findings that the appellant is not entitled to a waiver of recovery of the overpayment but is entitled to adjustment of the repayment schedule on the grounds of financial hardship, and REMAND the appeal to the Atlanta Regional Office for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 By reconsideration decision dated July 23, 2009, OPM informed the appellant that the amount of his interim annuity payments exceeded the correct amount of his regular annuity, and that he had received an overpayment of \$4,195.97. Initial Appeal File (IAF), Tab 6, Subtab 2A at 1. OPM further determined that the appellant was not entitled to a waiver of recovery of the overpayment, and that it would collect the overpayment by deducting \$69.00 per month from his annuity until the overpayment was recovered. *Id.* at 4.

¶3 The appellant appealed OPM's reconsideration decision and requested a hearing in his appeal. IAF, Tab 1. He asserted that he was without fault in the creation of the overpayment and he requested a waiver of recovery on the grounds of financial hardship. IAF, Tab 3 at 1.

¶4 After a hearing, the administrative judge found, based on the parties' stipulations during the prehearing conference, IAF, Tab 9 at 3, and at the beginning of the hearing, Hearing Compact Disc (HCD), that OPM proved the existence and amount of the overpayment and the appellant was without fault in the creation of the overpayment. Initial Decision (ID) at 2-3. He further found that the appellant failed to prove that recovery of the overpayment would cause financial hardship and, therefore, the appellant was not entitled to a waiver of recovery of the overpayment. *Id.* at 3-5. The administrative judge determined, however, that the appellant established that he needed substantially all of his

current income and liquid assets to meet his current ordinary and necessary living expenses. *Id.* at 6. Thus, the administrative judge found that “recovery of the overpayment at OPM’s presently scheduled rate would cause the appellant a financial hardship.” *Id.* Accordingly, the administrative judge found that adjustment of the repayment schedule was warranted. *Id.* At the end of the body of the initial decision, the administrative judge stated that the repayment schedule should be reduced to \$69.00 per month as that was the amount OPM was willing to accept in settlement of the appeal. *Id.* He concluded the initial decision by finding that OPM’s reconsideration decision was “AFFIRMED AS MODIFIED,” and by ordering OPM to reduce the repayment schedule to a rate of \$5.00 per month. *Id.* at 7. The administrative judge notified the parties that the initial decision would become the final decision of the Board on January 4, 2010, unless either party filed a petition for review. *Id.*

¶5 Thereafter, the administrative judge issued a December 1, 2009 erratum to correct a typographical error in the initial decision. IAF, Tab 11. On January 12, 2010, the administrative judge issued a second erratum which stated, in relevant part, “In the ‘Order’ section of the initial decision . . . the amount to be collected was incorrectly identified as ‘\$5.00.’ The amount to be collected is hereby corrected to read, ‘\$69.00.’” IAF, Tab 12.

¶6 On January 22, 2010, the appellant filed a petition for review in which he argued that the January 12, 2010 erratum increased his monthly repayment to OPM by \$64.00 and that the initial decision contained “many issues that were not correct.” He requested that the Board review the “decision in its entirety.” Petition for Review (PFR) File, Tab 1 at 2. The Clerk of the Board informed the appellant that his petition for review appeared to be untimely and ordered him to file a motion and an affidavit or statement signed under penalty of perjury setting forth good cause for the untimely filing. PFR File, Tab 2. The appellant timely responded to the Clerk’s notice with a sworn statement in which he asserted that he had not intended to file a petition for review until he received the erratum that

adjusted the repayment schedule in favor of OPM by \$64.00 per month. PFR File, Tab 4 at 3, 5. He further stated that he could not have filed a petition for review in a timely manner because the administrative judge did not issue the erratum until after the deadline for filing a petition for review elapsed. *Id.* Tab 4 at 3-5. OPM responded in opposition to the petition for review. PFR File, Tab 5.

ANALYSIS

The appellant has shown good cause for waiving the deadline for filing a petition for review.

¶7 Generally, a petition for review must be filed within 35 days after the issuance of the initial decision. [5 C.F.R. § 1201.114](#)(d). The Board will waive this time limit only upon a showing of good cause for the delay in filing. [5 C.F.R. §§ 1201.12](#), 1201.114(f). To establish good cause for an untimely filing, a party must show that he exercised due diligence or ordinary prudence under the particular circumstances of the case. *Alonzo v. Department of the Air Force*, [4 M.S.P.R. 180](#), 184 (1980). To determine whether an appellant has shown good cause, the Board will consider the length of the delay, the reasonableness of his excuse and his showing of due diligence, whether he is proceeding pro se, and whether he has presented evidence of the existence of circumstances beyond his control that affected his ability to comply with the time limits or of unavoidable casualty or misfortune which similarly shows a causal relationship to his inability to timely file his petition. *Moorman v. Department of the Army*, [68 M.S.P.R. 60](#), 62-63 (1995), *aff'd*, 79 F.3d 1167 (Fed. Cir. 1996) (Table).

¶8 Here, there is no question that the appellant filed his petition for review after the deadline for filing had passed. The appellant asserts in his sworn statement that he believed that the initial decision directed OPM to withhold only \$5.00 per month from his annuity in recovery of the overpayment, and that he was satisfied with that outcome and did not wish to seek review before the Board. *See* PFR File, Tab 4 at 3-5. However, only when the administrative judge issued

his January 12, 2010 erratum purporting to correct the initial decision and directing OPM to withhold \$69.00 per month, did the appellant believe he had grounds for petitioning for review, and he filed his petition for review promptly thereafter. *Id.*

¶9 We find that the administrative judge lacked the authority to issue the January 12, 2010 erratum. The Board's regulations provide that once an administrative judge issues an initial decision, he retains jurisdiction "only to the extent necessary to" correct the transcript, adjudicate addendum proceedings (which is not at issue here), or vacate an initial decision before it becomes final to accept a settlement agreement into the record. [5 C.F.R. § 1201.112\(a\)](#). Further, administrative judges lack the authority to reopen or reinstate appeals in which there has been a final Board decision; that authority is reserved to the Board. *See, e.g., Robey v. U.S. Postal Service*, [105 M.S.P.R. 539](#), ¶ 10, *aff'd*, 253 F. App'x 933 (Fed. Cir. 2007), *cert. denied*, 128 S. Ct. 1925 (2008); *McNeil v. U.S. Postal Service*, [98 M.S.P.R. 18](#), ¶ 8 (2004). Because the initial decision became the final decision of the Board on January 4, 2010, the administrative judge no longer retained jurisdiction over the appeal when he issued the erratum on January 12, 2010.

¶10 Ordinarily, the belated discovery of a basis for filing a petition for review does not establish good cause for waiving the filing deadline. *See, e.g., Damaso v. Office of Personnel Management*, [86 M.S.P.R. 371](#), ¶ 5 (2000); *Katovich v. Department of the Air Force*, [58 M.S.P.R. 444](#), 446, *appeal dismissed*, 14 F.3d 613 (Fed. Cir. 1993) (Table). In this case, however, the outcome of the appeal itself is unclear because of the ambiguities in the initial decision. Furthermore, the administrative judge's improper issuance of the erratum adds to the confusion surrounding the initial decision. Under the circumstances of this case, we find that the appellant's explanation for the delay in filing his petition for review is plausible and reasonable, and we find that he has shown good cause for waiving the filing deadline.

The appeal must be remanded for further proceedings.

¶11 Recovery of an overpayment may be waived when the annuitant is without fault and recovery would be against equity and good conscience. [5 U.S.C. § 8346\(b\)](#); *Uresti v. Office of Personnel Management*, [108 M.S.P.R. 262](#), ¶ 8 (2008); [5 C.F.R. § 831.1401](#). The administrative judge found that the appellant was without fault in the creation of the overpayment. ID at 3. Recovery is against equity and good conscience when: (1) It would cause financial hardship; (2) the annuitant can show that, because of the overpayment, he relinquished a valuable right or changed positions for the worse; or (3) recovery could be unconscionable under the circumstances. *Wright v. Office of Personnel Management*, [105 M.S.P.R. 419](#), ¶ 4 (2007); [5 C.F.R. § 831.1403\(a\)](#). Only financial hardship is at issue in this matter.

The appellant may be entitled to a waiver of recovery of the overpayment.

¶12 Financial hardship is deemed to exist where the annuitant from whom collection is sought needs substantially all of his current income and liquid assets to meet current ordinary and necessary living expenses and liabilities. *Wright*, [105 M.S.P.R. 419](#), ¶ 6; [5 C.F.R. § 831.1404](#). For purposes of determining whether an annuitant is entitled to a waiver of recovery of the overpayment on the grounds of financial hardship, the annuitant's monthly expenses are calculated by adding the annuitant's ordinary and necessary monthly expenses and \$50.00 for emergency expenses, as allowed by OPM. *Fearon v. Office of Personnel Management*, [109 M.S.P.R. 606](#), ¶ 6 (2008). Ordinary and necessary living expenses include rent, mortgage payments, utilities, maintenance, food, clothing, insurance (life, health, and accident), taxes, installment payments, medical expenses, support expenses when the annuitant is legally responsible, and other miscellaneous expenses which the individual can establish as being ordinary and necessary. *Wright*, [105 M.S.P.R. 419](#), ¶ 6; [5 C.F.R. § 831.1405](#). In determining

whether living expenses are ordinary and necessary, the Board applies a reasonable person test regardless of the annuitant's accustomed standard of living. *Wright*, [105 M.S.P.R. 419](#), ¶ 6. The Board will give the appellant the benefit of the doubt unless the expense clearly constitutes an extravagance or a luxury. *Id.* In the absence of a specific challenge by OPM, an appellant seeking a waiver of an annuity overpayment should not be required to substantiate his expenses and income unless the information appears incomplete or unreasonable on its face. *Id.*

¶13 The administrative judge, relying on the appellant's November 2009 Financial Resources Questionnaire, IAF, Tab 7, and on his hearing testimony, *see* HCD, found that the appellant claimed a monthly income of \$7,340.00 and monthly expenses of \$8,126.00. *Id.* at 4. For the first time at the hearing, OPM challenged the appellant's claimed monthly expenses for food and household maintenance. *See* HCD. OPM represented at the hearing that the United States Department of Agriculture's "Cost of Food at Home" calculation for October 2009 reflected that the average monthly cost of food in the continental United States at the most generous level for a three-person household such as the appellant's was \$861.00. *Id.*; *see* <http://www.cnpp.usda.gov/usdafoodcost-home.htm>. The administrative judge agreed that the appellant's claimed expense of \$1,015.00 per month for food appeared excessive and he reduced it to \$800.00, a net reduction of \$215.00. *Id.* at 4-5.

¶14 OPM also asserted for the first time at the hearing that the appellant's claimed expenses of \$500.00 per month for household maintenance appeared to be excessive. *See* HCD. The appellant explained that he arrived at the figure of \$500.00 per month by calculating the amount he had spent on household maintenance over the past year, and dividing that amount by twelve to arrive at a monthly average. *Id.* He testified that he had accumulated some \$6,000.00 in expenses in the past year, including internal household repairs, exterior maintenance to his house, lawn care, and pool cleaning, which amounted to an

average of \$500.00 per month. *Id.* The administrative judge found that this amount was excessive because it was based on an estimate rather than on actual costs and because the appellant did not adequately explain why the amount was reasonable. ID at 5. The administrative judge reduced this figure to \$100.00 per month, a net decrease of \$400.00. *Id.* He did not, however, make any finding as to whether expenses for pool cleaning and lawn care are ordinary and necessary living expenses. *See Portello v. Office of Personnel Management*, [54 M.S.P.R. 261](#), 267-68 (1992).

¶15 Applying these adjustments, the administrative judge calculated that the appellant's monthly expenses were reduced to \$7,516.00 and his income increased to \$7,950.00, resulting in a surplus of \$384.00 per month after factoring in an allowance of \$50.00 for emergencies. ID at 5; *see Fusco v. Office of Personnel Management*, [42 M.S.P.R. 501](#), 508 (1989). The administrative judge did not explain why he concluded that \$800.00 in monthly food expenses was reasonable when OPM had only suggested that the figure be reduced to \$861.00 per month consistent with the Department of Agriculture's calculations, and he did not explain how he determined that \$100.00 per month was reasonable for household maintenance. Even if we were to accept the administrative judge's reductions, he reduced the appellant's monthly expenses by \$615.00 per month, resulting in overall expenses of \$7,511.00, not \$7,516.00 as the administrative judge calculated. We cannot discern, however, how the administrative judge determined that a reduction in the appellant's monthly *expenses* resulted in an increase in the appellant's *income*. Because we cannot determine from this record how the administrative judge arrived at his determinations concerning the appellant's monthly income and expenses, a remand is necessary. *Gott v. Office of Personnel Management*, [97 M.S.P.R. 538](#), ¶ 19 (2004).

¶16 Furthermore, we note that the appellant did not submit any documentary evidence to substantiate his claimed food and household maintenance expenses, and there is no indication in the record that the administrative judge placed him

on notice prior to the hearing that these claims required further explanation. Therefore, the administrative judge should have asked the appellant for clarifying information. *Gulan v. Office of Personnel Management*, [86 M.S.P.R. 16](#), ¶ 13 (2000); *Nixon v. Office of Personnel Management*, [52 M.S.P.R. 672](#), 677 (1992). Because he did not do so, we find that a remand is necessary. *Lopez v. Office of Personnel Management*, [47 M.S.P.R. 186](#), 191 (1991).

If the appellant is not entitled to a waiver of recovery of the overpayment, he may be entitled to an adjustment of the repayment schedule.

¶17 Additionally, although the administrative judge found that the appellant was not entitled to a waiver, a finding which we vacate, he determined that the appellant showed that he was entitled to an adjustment of the repayment schedule under the more lenient standard for establishing financial hardship applicable here. *See Wagner v. Office of Personnel Management*, [83 M.S.P.R. 355](#), ¶ 6 (1999) (in determining whether an annuitant is entitled to an adjustment of the repayment schedule based on financial hardship, the standard is ordinarily not applied as strictly as it is in determining entitlement to a waiver). However, the administrative judge mistakenly stated that OPM had set the repayment schedule at \$366.67 per month, when OPM had actually set a repayment schedule of \$69.00 per month. *Compare* ID at 5, *with* IAF, Tab 6, Subtab 2A at 4. By purportedly reducing the repayment schedule from \$366.67 to \$69.00 per month, the administrative judge in fact made no reduction at all. Further, his purported adjustment of the repayment schedule in the body of the initial decision to \$69.00 per month, ID at 6, is inconsistent with the language in the order section of the initial decision changing the repayment schedule to \$5.00 per month, *id.* at 7. Complicating these ambiguities further, as noted above, the administrative judge issued an erratum after the initial decision became final in which he attempted to change the language in the order section of the initial decision to make it consistent with the remainder of the initial decision, i.e., by ordering OPM to reduce the repayment schedule to \$69.00 per month instead of \$5.00 per month.

IAF, Tab 12. As discussed above, the erratum is of no legal effect because it was issued after the initial decision became the final decision of the Board. Yet, even if we were to give the erratum legal effect here, the initial decision as altered by the erratum continues to be fatally ambiguous because a purported reduction in the repayment schedule to \$69.00 per month is not a reduction at all for the reasons noted above. For all of the foregoing reasons, we find it necessary to remand this appeal for further adjudication and clarification.

ORDER

¶18 Accordingly, we REMAND this appeal to Board's Washington* Regional Office for further adjudication and development of the record on the issue of whether the appellant is entitled to a waiver of recovery of the overpayment on the grounds of financial hardship. On remand, the administrative judge shall provide the appellant with an opportunity to submit evidence and argument showing that his claimed expenses for food and household maintenance are ordinary and necessary living expenses and that the amounts claimed are reasonable. The administrative judge shall also afford OPM the opportunity to respond to the appellant's additional submission. If the administrative judge determines on remand that the appellant is not entitled to a waiver of recovery of the overpayment, he shall reconsider the question of whether the appellant is entitled to adjustment of the repayment schedule on the grounds of financial hardship. The administrative judge shall then issue a new initial decision that

* The administrative judge who adjudicated this case below has relocated from the Board's Atlanta Regional Office to the Washington Regional Office.

provides a reasoned explanation as to whether the appellant is entitled to a waiver of recovery of the overpayment based on financial hardship and, if not, whether he is entitled to adjustment of the repayment schedule.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.